82-977
No._____

IN THE

Supreme Court of the United States

October Term, 1982

MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES,

Appellant,

and

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, MINNESOTA EDUCATION ASSOCIATION, and NATIONAL EDUCATION ASSOCIATION, et al.,

Appellants,

v.

LEON W. KNIGHT, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

JURISDICTIONAL STATEMENT OF APPELLANT LABOR ORGANIZATIONS

OPPENHEIMER, WOLFF, FOSTER, SHEPARD AND DONNELLY
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QUESTIONS PRESENTED

1. Does a state public employee bargaining law violate the First and Fourteenth Amendments to the United States Constitution where it requires a public employer to formally meet and confer with an exclusive bargaining representative of professional employees, and permits that exclusive representative to retain control over the selection of persons to participate on behalf of the employees in meet and confer activities?

2. Did the district court abuse its discretion in awarding plaintiffs 20 percent of their costs in this case?

PARTIES TO THE PROCEEDING

The caption of this case which contains the names of all parties to the proceeding before the three-judge United States District Court whose judgment on the above-stated questions Appellants seek to have reviewed is as follows:

Leon W. Knight, Morgan Kjer, Donald A. Dahlin, James D. Wallace, Terrence D. Florin, William B. Bauman, Harold J. Gardner, Thomas J. Patin, Eugene D. Mielke, Dr. Richard A. Thompson, David R. Grout, Joan M. Farkas, Gary Lee Nelson, Ronald Lievense, Lucille Johnson, Virginia E. Lanegran, Max A. Malmquist, Ralph G. Powell, Richard D. Isenhart, Cresston Gackel, Plaintiffs.

v.

Minnesota Community College Faculty Association; Minnesota Education Association; Independent Minnesota Political Action Committee for Education; National Education Association; James A. Norman, individually and in his former official capacity as President, Minnesota Community College Faculty Association; James K. Durham, individually and in his official capacity as Vice President, Minnesota Community College Faculty Association; Robert Bell, individually and in his official capacity as Secretary, Minnesota Community College Faculty Association; Calvin Minke, individually and in his official capacity as Treasurer, Minnesota Community College Faculty Association; Ralph S. Chesebrough, individually and in his official capacity as Executive Secretary, Minnesota Community College Faculty Association; Donald Holman, individually and in his official capacity as Minnesota Education Association Representative, Minnesota

Community College Faculty Association; William M. Mondale, individually and in his former official capacity as President, Minnesota Education Association; James Rosasco, individually and in his former official capacity as President, 1973-1974, Minnesota Education Association; Alfred F. Provo, individually and in his former official capacity as Treasurer, Minnesota Education Association; Albert L. Gallop, individually and in his official capacity as Executive Director, Minnesota Education Association; Fulton B. Klinkerfues, individually and in his former official capacity as President, Independent Minnesota Political Action Committee for Education; Janet R. Morgan, individually and in her former official capacity as Vice President, Independent Minnesota Political Action Committee for Education; John W. Schutt, individually and in his official capacity as Treasurer, Independent Minnesota Political Action Committee for Education; James A. Harris, individually and in his former official capacity as President, National Education Association; Helen D. Wise, individually and in her former official capacity as President, 1973-74, National Education Association; Catherine O'C. Barrett, individually and in her former official capacity as President, 1972-1973, National Education Association; Terry E. Herndon, individually and in his official capacity as Executive Secretary, National Education Association; Sam E. Lambert, individually and in his former official capacity as Executive Secretary, 1972-1973, National Education Association; Raymond Crippen, Rosemary McVay, John Sontorovich, Hugh V. Plunkett III, Arleene Nycklemoe, Douglas Alan Bruce, Ronald H. Denison, Edward G. Ziegler, Val Bjornson, Charles Swanson, in-

dividually; Phillip C. Helland, individually and in his official capacity as Chancellor of the Minnesota Community Colleges; John F. Helling, individually and in his official capacity as President, North Hennepin Community College; Dale A. Lorenz, individually and in his official capacity as President, Normandale Community College; Neil Christenson, in his official capacity as President, Anoka-Ramsey Community College; Wayne S. Burggraaff, in his official capacity as Minnesota Commissioner of Finance; James Lord, in his official capacity as Minnesota State Treasurer; Peter Obermeyer, in his official capacity as Director of the Minnesota State Bureau of Mediation Services; Willard H. McGuire, in his official capacity as President, National Education Association; Roger Johnson, in his official capacity as Chairman, Independent Minnesota Political Action Committee for Education; Donald C. Hill, in his official capacity as President, Minnesota Education Association, Toyse Kyle, Elma Ponto, Joseph Norquist, Nadine Chase, Paul Brinkman, in their official capacities as members of the Minnesota State Board for Community Colleges, Defendants.

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JURISDICTIONAL STATEMENT OF APPELLANT LABOR ORGANIZATIONS

INTRODUCTION

The Minnesota Community College Faculty Association (MCCFA), the Minnesota Education Association (MEA) and the National Education Association (NEA), defendants below, have appealed portions of the final order of the United States District Court for the District of Minnesota entered

on March 31, 1982, and reaffirmed by an order entered on August 13, 1982. The parts of the court's orders appealed from are:

1. The court's ruling that an exclusive bargaining representative may not retain exclusive control over selection of the membership of meet and confer committees (Sections 1, 2 and 3 of the court's Order for Judgment); and

2. The court's ruling that 20 percent of plaintiffs' costs be taxed against the MCCFA and the Minnesota State Board of Community Colleges.

The MCCFA, MEA and NEA (hereinafter referred to collectively as "the appellant labor organizations") submit this jurisdictional statement to show that the Supreme Court has jurisdiction over this appeal, and that a substantial question has been presented.

CITATION TO OPINION BELOW

The opinion of the three-judge United States District Court has not been officially reported. It is set forth in the Appendix to the Jurisdictional Statement of Appellant State Board for Community Colleges (hereinafter "State Board") at p. A-7.[1] The District Court's Findings of Fact are set forth in that Appendix at p. A-32.

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[1] All references to pages in the Appendix contained herein are references to the Appendix previously submitted by the other Appellant before the Court, the State Board.

JURISDICTION

This action was commenced by plaintiffs pursuant to 42 U.S.C. §§ 1983, 1985(3), 1986, and 1994 alleging violations of their rights under the First, Ninth, Tenth, Thirteenth and Fourteenth Amendments to the United States Constitution. The action sought an injunction restraining the enforcement and operation of a state statute, and thus a three-judge district court panel was established pursuant to 28 U.S.C. §§ 2281 and 2284.

The district court issued its order granting in part and denying in part the relief sought by plaintiffs on March 31, 1982. Motions for relief from judgment, for a new trial and to alter or amend the judgment by both plaintiffs and defendants were denied by the court on August 13, 1982. The appellant labor organizations filed a notice of appeal with the United States District Court for the District of Minnesota on October 12, 1982.

The Supreme Court is vested with jurisdiction over this appeal by 28 U.S.C. § 1253.

THE STATUTE INVOLVED

The district court declared unconstitutional, as applied, certain provisions of the Minnesota Public Employment Labor Relations Act (hereinafter "PELRA"), Minn. Stat. 179.61-179.76 (1980). Pertinent portions of PELRA are set forth in the Appendix.

In addition, the appellant labor organizations' appeal of the district court's cost award to plaintiffs involves Rule 54(d), Fed. R. Civ. P., which provides:

> Except when express provision therefore is made either in a statute of the United States or in these rules, costs

shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

STATEMENT OF THE CASE

The primary question presented to the Court by this appeal concerns the constitutionality of portions of the Minnesota Public Employment Labor Relations Act, Minn. Stat. 179.61-179.76 (1980). PELRA establishes a comprehensive framework for collective bargaining by Minnesota public employees. The appellees, plaintiffs below, are public employees under PELRA who are employed as instructors by appellant State Board. The appellant labor organizations include the MCCFA, which is the certified bargaining representative of all instructors employed by the State Board, and two affiliated organizations, the Minnesota Education Association and the National Education Association.

The framework established by PELRA borrows in certain respects from familiar principles of labor law established in the private sector. In particular, PELRA embraces the concept of exclusivity of the certified exclusive representative. The statute sets forth procedures, supervised by a state agency (the Bureau of Mediation Services), to assure the fair selection of an employee organization as exclusive representative by a majority of the employees in an appropriate bargaining unit. Minn. Stat. 179.67, Appendix at A-91-95. Once certified, the employee organization under PELRA, like that in the private sector, has the exclusive right and duty to represent

all employees in the bargaining unit in the negotiation of terms and conditions of employment. The statute specifically prohibits a public employer from meeting and negotiating with anyone other than the exclusive representative. Pursuant to PELRA, the State Board and the MCCFA have negotiated several successive collective bargaining agreements covering terms and conditions of employment.

Also similar to the private sector, PELRA restricts the duty to negotiate imposed on the public employer to those matters which are "terms and conditions of employment," a phrase defined by the statute. Minn. Stat. 179.63, subd. 18, Appendix at A-89. The public employer is not required to meet and negotiate concerning matters of "inherent managerial policy" which under law include "such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure and selection and direction and number of personnel." Minn. Stat. 179.66, subd. 1, Appendix at A-90-91.

While not required to negotiate concerning managerial policies, the public employer is required by PELRA to "meet and confer" with representatives of its professional employees concerning all matters relating to employment which are not within the scope of mandatory bargaining. Minn. Stat. 179.66, subd. 3, Appendix at A-91. Meet and confer is defined as "the exchange of views and concerns between employers and their respective employees." Minn. Stat. 179.63, subd. 15, Appendix at A-89. Even professional employees who have determined not to collectively bargain terms and conditions of employment have the right to meet and confer through a selected representative. Minn. Stat. 179.73, Appendix at A-95. Where a collective bargaining representative has been chosen, however, that "meet and negotiate" representative is also the "meet and confer" representative because the principle of

exclusivity applies to the meet and confer function, and the employer must only engage in formal meet and confer with the exclusive representative. Minn. Stat. 179.66, subd. 7, Appendix at A-91. PELRA preserves the right of the individual employee to express views, grievances, complaints or opinions concerning employment related matters. Minn. Stat. 179.65, subd. 1, Appendix at A-89-90.[2]

In the context of the instant case, the lower court found that the exclusive representative, through the meet and confer process, has replaced the "faculty senates" which had prior to PELRA served as the vehicle through which community college instructors, on an organized and formal basis, expressed views to the community college administration. Prior to PELRA, the elected faculty senates communicated with the administration concerning matters now negotiable, as well as matters which continue to be recognized as within the province of employer discretion, *e.g.* curriculum matters, degree requirements, academic standards and general budget and planning issues on the campuses. Findings of Fact, Appendix at A-48-49. With the certification of the MCCFA as exclusive representative, the formal communication system between faculty and administration concerning the nonbargainable issues has become "meet and confer" sessions[3]

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[2] This right is further buttressed by a recent amendment to PELRA. The Minnesota Legislature amended Minn. Stat. § 179.66, subd. 7, in 1982 by adding the following clause at the end of the existing language: "provided that this subdivision shall not be deemed to prevent the communication to the employer, other than through the exclusive representative, of advice or recommendations by professional employees, when such communication is a part of the employee's work assignment." Minn. Laws 1982, ch. 568, § 2.

[3] The term "meet and confer" encompasses both local campus level meetings known as "exchange of views" and system-wide level meetings known as "meet and confer."

where the selected representatives of both sides conduct the dialogue. The collective bargaining agreement recognizes the exclusive right of the MCCFA to meet and confer with the State Board. Appendix at A-96-98. The lower court found that faculty who are not on meet and confer committees have the opportunity to and engage in discussions of an informal nature with members of the administration concerning topics covered in meet and confer sessions. Findings of Fact, Appendix at A-49-50.

The primary issue raised before the Court by this appeal results from the MCCFA's practice of appointing only its members to meet and confer committees. Findings of Fact, Appendix at A-50. Instructors in the faculty bargaining unit are free to join or not to join the exclusive representative as members. Appellees are instructors who have chosen not to join the MCCFA. They initiated this action in part to challenge the constitutionality, on First Amendment grounds, of the meet and confer provisions discussed above on both facial and as applied grounds. Appellees' "meet and confer" claim was only a portion of a substantial assault on the overall constitutionality of PELRA, and the ability of the MCCFA to constitutionally act as an exclusive representative of public employees.

The complaint and request for a three-judge district court was filed in the United States District Court for the District of Minnesota on December 19, 1974. After appellees' request for the impaneling of a three-judge court was denied by the district court, the United States Court of Appeals for the Eighth Circuit, on May 17, 1976, reversed and ordered such a three-judge panel established. *Knight v. Alsop*, 535 F. 2d 466 (8th Cir. 1976). Discovery followed, with appellees unsuccessfully seeking appellate relief from certain district

court decisions concerning discovery issues *Knight v. Heaney*, 444 U.S. 821 (1979) (denying motion for leave to file writ of mandamus); *Knight v. Heaney*, 614 F. 2d 1162 (8th Cir. 1980) *petition for rehearing en banc denied*, 614 F. 2d 1162 (8th Cir. 1980) (denying petition for writ of mandamus) *cert. denied* 449 U.S. 823 (1980). On December 13, 1979, the district court appointed a special master to conduct the trial of this matter. The trial commenced on August 4, 1980, and recommended findings of fact were issued by the special master on March 23, 1981. The district court issued its Findings of Fact on November 16, 1981, and its Memorandum Opinion and Order on March 30, 1982.

Besides the meet and confer issue, appellees raised substantial issues challenging the constitutionality of exclusive representation in collective bargaining under PELRA, and the ability of the MCCFA to constitutionally act as an exclusive representative. The district court's order ruled against appellees on these issues. Further, the court upheld the facial constitutionality of the meet and confer provisions of PELRA. However, the court sustained appellees' contention that it is unconstitutional under the First and Fourteenth Amendments to the United States Constitution for the meet and confer process to operate in a way which excludes instructors who are not members of the MCCFA from participating in the selection of or being eligible for membership on meet and confer committees. In addition, the district court ruled that 20 percent of appellees' costs would be assessed against the State Board and the MCCFA.

QUESTIONS WHICH ARE SUBSTANTIAL

The district court (Judge Earl Larson dissenting) ruled that the "meet and confer" provisions of PELRA are unconstitutional to the extent that the exclusive bargaining representative retains exclusive authority to select faculty members to participate in the meet and confer process and in practice excludes non-members from being on meet and confer committees. The court ruled that the present system was constitutionally offensive because non-members were denied a fair opportunity to participate in the selection of governance representatives. Memorandum Opinion and Order, Appendix at A-22. The lower court's decision is an unwarranted extension of First Amendment rights which interferes with the effective functioning of the exclusive representative, as well as the collective bargaining process.

A. The District Court Decision Improperly Assumes the Existence of First Amendment Interests.

Critical to the lower court's ruling that the meet and confer provisions of PELRA, as applied in the Minnesota community colleges, are unconstitutional, is an incorrect assumption that First Amendment interests are involved in the meet and confer process and that a state must create a "fair selection system" in deciding who it wishes to confer with. In describing the provisions of PELRA which govern selection of meet and confer representatives, the court states:

> Thus, the weight and significance of *individual speech interests* have been consciously derogated in favor of systematic, official expression.

Memorandum Opinion and Order, Appendix at A-20 (emphasis supplied). The court cites as authority decisions of this Court which concern issues of mandatory loyalty oaths for teachers (*Keyishian v. Board of Regents*, 385 U.S. 589 (1967)), compulsory divulgence by teachers of membership in associations (*Shelton v. Tucker*, 364 U.S. 479 (1960)), and intrusion by the state into the content of a professor's lectures (*Sweezy v. New Hampshire*, 354 U.S. 234 (1957)). The lower court acknowledges the inapplicability of these cases. Memorandum Opinion and Order, Appendix at A-21. None of the cases in which this Court has addressed the issue of academic freedom as within the protection of the First Amendment support an intrusion into the procedure which a college administration uses to confer with its faculty.

The lower court's assumption that the ability of faculty members to meet and confer with the community college administration implicates First Amendment interests is incorrect. The court has found that the duty of a public employer to meet and confer is of statutory—not constitutional—origin. Findings of Fact, Appendix at A-47. Applied to this case, PELRA's meet and confer provisions mean that the State of Minnesota has decided that it does not wish to formally exchange views and concerns with employees other than through the employees' exclusive representative. The right to free speech does not imply the right to compel a listener. Nor does it imply the right to compel that listener to respond and exchange views. Nothing in the First Amendment commands that committees of Congress or the President listen in person to the views of each citizen, or even each federal employee. Nor must agents be employed for this purpose. Congress and the President each have the right to decide who they wish to confer with. The State of Minnesota has this same right.

Significantly, the meet and confer process pertains only to those subjects which are inherent management policy. This Court has ruled that public employees have no constitutional right to collectively bargain concerning their terms and conditions of employment. *Smith v. Arkansas State Highway Employees*, 441 U.S. 463 (1979). It stands to reason, therefore, that a right to consult concerning managerial policy decisions does not exist unless granted by statute. District courts have specifically held that faculty members have no constitutional right to participate in a college administration's decision-making process. *Johnson v. Board of Regents*, 377 F. Supp. 227 (W.D. Wisc. 1974); *Peacock v. Board of Regents*, 380 F. Supp. 1081 (D. Ariz. 1974).[4]

The lower court primarily relies upon the "tradition of shared decision-making" in the field of higher education as support for its inference of a First Amendment interest in meeting and conferring. Memorandum Opinion and Order, Appendix at A-18-A-22. Appellants do not disagree with the court's assessment that such shared decision-making is a valuable and desirable process. The court's assumption that the First Amendment restricts the way in which the state may structure such shared decision-making, however, is erroneous.

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[4] The lower court acknowledges that meet and confer meetings are not a public forum and therefore no right to participate arises under *City of Madison v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976). Memorandum Opinion and Order, Appendix at A-22n.18.

B. Even If First Amendment Interests Were Involved, They Are Not Offended by the Present Meet and Confer System.

After assuming the involvement of free speech interests, the lower court acknowledges that the state may properly require that a faculty governance system occur on a representational basis. Indeed, the faculty senates predating PELRA functioned through elected representatives. Findings of Fact, Appendix at A-48-49. The court states that PELRA's requirement that "meet and confer" occur between selected representatives of both sides has no constitutional infirmity; individual faculty members have no First Amendment right to individually "meet and confer" with the administration. Memorandum Opinion and Order, Appendix at A-22.

The court rules, however, that faculty members have a First Amendment right to "a fair opportunity to participate in the selection of governance representatives." Memorandum Opinion and Order, Appendix at A-23. Although such a requirement is questionable, as argued above, in any case it is plain that such a "fair opportunity" exists under PELRA.

Nowhere is the fundamental flaw in the court's decision more obvious than in its statement of the issue before it:

> The issue here is whether faculty members may be excluded from participating in selection of meet and confer representatives and from serving as such representatives, which is a question of first impression.

Memorandum Opinion and Order. Appendix at A-21 n. 16. Non-members of the MCCFA are *not* excluded from participating in the selection of the meet and confer representative. As noted above, PELRA establishes elaborate procedures for the selection of the exclusive representative through a demo-

cratic process supervised by an independent state agency, the Bureau of Mediation Services. All faculty members, regardless of their affiliations, may participate in this process, just as they participated in the process of selecting the faculty senates or councils. The statute also provides that dissatisfied employees may petition for replacement or disestablishment of the exclusive representative. This procedure allows a "fair opportunity to participate in the selection of governance representatives" if the First Amendment be thought to impose such a requirement.

Appellees' complaint arises from the fact that the MCCFA, and not appellees (or any organization they are entitled to form), has been selected by the faculty to be their meet and confer representative. Because the selection of the exclusive representative has occurred on a democratic basis encompassing all faculty, the fact that non-MCCFA members have not, as a matter of practice, been included on meet and confer committees is of no constitutional significance. Certainly a faculty senate may choose its committees from among senate members, without being constitutionally required to appoint faculty members who were not elected to the body. For constitutional purposes, the MCCFA's selection of meet and confer committees is no different.

This argument was noted but not persuasively refutted by the lower court. Memorandum Opinion and Order, Appendix at A-27-A-28. Viewed in this light, the lower court is actually holding that the First Amendment prohibits the state from requiring the selection of a "meet and negotiate" representative and a "meet and confer" representative at the same time, on the same ballot. The court is ruling that professional employees must have separate votes for the "meet and negotiate" and "meet and confer" representatives. Even assuming

that the First Amendment establishes a "fair opportunity to participate" requirement in this context, it is inconceivable that it compels the state to conduct a two-tiered selection process for the two functions. There is no constitutional basis for asserting that the present system for selection of the meet and confer representative is "unfair." *Gonzales v. Irizarry*, 387 F. Supp. 942 (D.P.R. 1974).

The lower court's decision is unassisted by its assertion that the "right [of non-member instructors] to speak out is further impaired by the knowledge that one could be excluded from serving in the process if the MCCFA should desire to retaliate for protected speech activity." Memorandum Opinion and Order, Appendix at A-28. Importantly, the court found no evidence of such retaliation. Findings of Fact, Appendix at A-52. More fundamentally, it is essential to any selection process that the views of the potential representative be taken into account. Certainly instructors voting in the separate meet and confer election envisioned by the lower court's decision would properly consider the views of those running in deciding who to vote for. If not being voted for or selected as a representative because of one's views is termed "retaliation," then such "retaliation" is a fairly common occurrence. If one's desire to be selected inhibits him from speaking his true mind, then such an inhibition can hardly be called unconstitutional. Such "retaliation" and "inhibition," if those labels be used, are inherent in any system for election of representatives.

C. The District Court's Decision Fails to Attribute Proper Significance To the State's Interests In the Present Meet and Confer Structure.

The lower-court acknowledges the compelling state interests supporting the establishment of collective bargaining by public employees over terms and conditions of employment which were recognized by this Court in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Memorandum Opinion and Order, Appendix at A-11-13. However, the lower court improperly denigrates those interests in ruling that the state may not require that the exclusive representative for "meet and negotiate" be recognized as the exclusive representative for "meet and confer" purposes. The interests which support the rule of exclusivity in negotiating terms and conditions of employment are equally compelling where representation of employee interests in non-negotiable areas are concerned.

The court asserts that, unlike other professional employees, community college faculty members do not need to be represented in meet and confer by the same exclusive representative which negotiates the collective bargaining agreement because of the "tradition of shared decisionmaking" in the community colleges. Memorandum Opinion and Order, Appendix at A-25. Prior to PELRA, the supposed "shared decisionmaking" extended to matters now classified as within and without the scope of mandatory bargaining. The court agrees with the legislature's judgment that the pre-PELRA system provided insufficient opportunity for employee input and therefore justified providing the opportunity for exclusive representation on terms and conditions of employment. The justification for exclusive representation in meet and confer is equally compelling. If pre-PELRA "shared decisionmaking" was in-

adequate for "meet and negotiate" subjects, it was just as inadequate for "meet and confer" topics.

The lower court also asserts that exclusivity is less necessary because "intangible" issues are involved in meet and confer, as opposed to the "tangible fruits" of negotiations over terms and conditions of employment. Memorandum Opinion and Order, Appendix at A-27-28. The labeling of a matter as "intangible" does not make it unimportant. Decisions made as a result of the meet and confer process on such matters as curriculum and overall budget will have substantial impact on the instructors in the bargaining unit. The lower court concedes the importance of these issues by describing meet and confer as an "important academic forum." Memorandum Opinion and Order, Appendix at A-22. A unified faculty voice forwarded by an exclusive representative is just as important where the "intangible" issues of meet and confer are concerned, as in the negotiation of employment conditions.

Finally, contrary to the assertions of the district court, irreconcilable demands may arise in a way which undermines union security if the "meet and negotiate" and "meet and confer" functions are carried out separately. Frequently matters arise which contain elements of both negotiable and non-negotiable subjects. In the private sector, for example, this Court has recognized that while the decision of management to close a plant may be non-negotiable, the impact of that decision is negotiable. *First National Maintenance Corp. v. N.L.R.B.*, 452 U.S. 666 (1981). The Minnesota Supreme Court has recognized a similar "decision-effects" rule in defining the duty to bargain under PELRA in such areas as teacher performance evaluation. *Minneapolis Federation of Teachers v. Minneapolis Special School District No. 1*, 258 N.W. 2d

802 (Minn. 1977). Such a dichotomy may be expected to be recognized in such critical areas as budget retrenchment. With respect to such issues, interaction and overlap between the meet and confer and meet and negotiate dialogues is inevitable. Unless the community college instructors are represented by an exclusive representative in both forums, their voice and ability to influence matters important to their welfare is greatly reduced. At best, the community college administration will face conflicting demands. At worst, the administration will play one group off against the other in order to achieve its own ends. For these reasons, the rationale supporting exclusivity in the formal "meet and confer" process is just as compelling as in the "meet and negotiate" arena.

D. The District Court Abused Its Discretion In Awarding Appellees Twenty Percent of Their Costs.

Based on its ruling in favor of the appellees on the meet and confer issue, the lower court awarded appellees twenty percent of their costs in this matter. Appellant labor organizations appeal this issue on the basis that so great an award of costs amounts to an abuse of discretion.

It is virtually uncontested that the "meet and confer" issue consumed an extremely small portion of the proceedings in this matter. In denying appellants' motion for an amended judgment on the costs issue, the district court stated:

> Defendants' motion to reduce the proportion of costs taxed against them is grounded on their contention that no more than 5-6 percent of the plaintiffs' efforts were expended on the "meet and confer" issue, the one issue on which plaintiffs prevailed. Plaintiffs have not disputed that the "meet and confer" issue was largely a discrete question of law and fact. Nor have they chal-

> lenged defendants' assertions that the "meet and confer" issue was addressed in only 3 percent of plaintiffs' exhibits, 6 percent of the trial transcripts, .004 percent of plaintiffs' proposed stipulations and by none of plaintiffs expert witnesses.

Order, Appendix at A-2. Despite this recognition of the small and discrete nature of the meet and confer issue, the court adhered to its twenty percent cost award. As rationale it offered an observation, inconsistent with the statement quoted above, that there is "overlap between the First Amendment claim as to meet and confer practices and other practices challenged by plaintiffs." Id.

The only overlap between the two claims is that both purported to invoke the same provisions of the Constitution. Beyond that the meet and confer issue had nothing in common with appellees' other claims. The appellees expended enormous time and energy in attempting to prove that the MCCFA, MEA and NEA are an "integrated" organization which is the constitutional equivalent of a "political party" and is engaged in a collective bargaining process which amounts to "fascism". These are matters totally unrelated to the comparatively narrow, though important, meet and confer issue.

The appellants should not, through a cost award, be required even in part to subsidize expensive and protracted litigation of the kind engaged in by appellees below. In describing the conduct of appellee's counsel, the lower court stated:

> Much of the present litigation has been a wasteful attempt to obfuscate and circumvent that clear holding [of *Abood v. Detroit Board of Education, supra.*]

Order, Appendix at A-5 n.2. The court further described appellees' theories as "frivolous" ones which could have been presented without the need for a trial of facts.

> Instead, the development of this theory was muddled with plaintiffs' theory that MCCFA, and probably any public sector union, is the constitutional equivalent of a political party, and was further blurred with repeated incantations that the arrangement under PELRA is the functional equivalent of Italian fascism and the National Industrial Recovery Act. *Indeed, the presentation of plaintiffs' case has hindered rather than helped the court to resolve the issues raised in their complaint.*

Order, Appendix at A-4 (emphasis supplied).

It is recognized that the lower court has substantial discretion in allocating cost awards. However, where the lower court has recognized that a discrete issue consumed substantially less cost than that percentage awarded, and further where the lower court recognized that the proceedings on issues as to which the appellees failed were bloated by the unreasonable conduct of appellees at trial, the lower court has ruled inconsistently and arbitrarily. The twenty percent costs award was an abuse of discretion.

CONCLUSION

The decision by the district court interferes with the statutory structure of employee relations established by the State of Minnesota. It does so by construing the First Amendment to require establishment of certain selection structures in the meet and confer process. Such an interference with the labor relations of the state and its employees is unwarranted and unjustified by the First Amendment and the jurisprudence thereunder. Further, the lower court abused its discretion in requiring appellants to pay twenty percent of appellee's costs in this matter. For these reasons and for the other reasons stated above, the appellant labor organizations request the Court to note probable jurisdiction.

Respectfully submitted,

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